No. 1127

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SUPREME COURT OF THE UNITED STATES

October Term, 1945

Hastings Manufacturing Company,
a Michigan corporation,
Petitioner,

v.

Federal Trade Commission,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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REARDON-PARSHALL CO.

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Argument:

A. Petitioner's policy of granting "obsolescence" protection, the guarantee of profits, and loans to its jobbers, did not constitute an unfair method of competition in commerce and an unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act 11

B. In the light of existing competitive conditions petitioner's practices of giving "obsolescence" protection, guarantee of profits, and loans to jobbers did not constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the provisions of the Federal Trade Commission Act 12

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I. Summary Statement of Matter Involved.

This is a petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of the Court affirming an order to cease and desist, entered by the Federal Trade Commission.

Petitioner, Hastings Manufacturing Company, is a Michigan corporation, with its principal offices and factory at Hastings, Michigan. In 1923 it started the manufacture of piston rings, solely for the automotive replacement trade, and has since been so engaged. Up until the latter part of 1935, petitioner and its competitor manufacturers made and sold only a cast-iron, or conventional type oil ring. At that time, petitioner came out with a ventilated steel oil ring under the name of "Steel-Vent," which had decided advantages. At that time petitioner was one of the small ring manufacturers and not a major factor in the industry. Subsequently all the major competitor ring manufacturers came out with a steel ring similar in character (R. 70; 573-4).

Piston rings for the replacement trade are sold by manufacturers to or through wholesale jobbers or replacement parts dealers who, in addition to one or more ring lines, usually carry a complete line of automotive replacement parts and accessories. The general practice in the replacement ring industry is for the manufacturer to dispose of its rings to its jobbers under so-called consignment contracts, where rings up to a specified amount, or "par value," are consigned to the jobber in the nature of a basic inventory, and any rings taken by that jobber in excess of such consigned stock are paid for by the jobber and become his property. This excess is termed "overage." It has always been the general practice in the industry for a manufacturer to take back for credit or exchange for new rings any of its rings (including "overage") in the hands of a jobber actively representing it, regardless of the character of those rings and irrespective of whether they were current or outmoded types (R. 70; 289; 291; 340; 390-2; 575).

When petitioner attempted to get jobbers to handle its new "Steel-Vent" ring it was met with threats by competitor manufacturers, whose line the jobber was then handling, to "pull" its line and make the jobber "swallow" his overage if he took on or refused to give up the Hastings line (R. 213; 438-440; 461; 578). In order to meet this situation, Hastings, about 1936, established a general policy of protecting all its jobbers against loss by reason of that jobber discontinuing a competitive line or by reason of a competitive manufacturer "pulling" its line. This was termed "obsolescence" protection. Under this policy, Hastings would take off the jobber's hands for credit at the jobber's cost any competitive rings which that jobber owned outright and which the manufacturer of those rings refused to take back unless the jobber gave up or refused to handle Hastings rings. All such rings were inventoried by Hastings and were not re-sold at any price. They were destroyed (R. 577-584). In a very few instances Hastings agreed to guarantee a jobber that his gross profit from Hastings rings would exceed that of the preceding year when he handled a competitive ring line. In every instance that such an offer was made it was to offset the threat of a competitor manufacturer to pull its line if the jobber took on or refused to give up Hastings. Hastings was never called upon to pay and never paid anything under such a guarantee (R. 753-5).

Petitioner also made loans to certain of its jobbers. All such loans, with the exception of one or two discharged by operation of law, have been paid in full or are currently being paid (C.E. 34 and 122).

Under date of February 10, 1940, the Federal Trade Commission issued its complaint (R. 7; 63) against Hastings, charging that its practice of "obsolescence" protection, guarantees, and loans constituted unfair trade practices within the provisions of the Federal Trade Commission Act. An answer was filed, hearing held, testimony taken, and a report upon the evidence filed by the Trial Examiner and, subsequently, a memorandum brief was filed in support of the complaint by the Chief Counsel and Trial Attorney for the Commission. On December 27, 1940, the Commission entered its order that said "proceeding be, and the same hereby is, dismissed without prejudice" (R. 16; 64). On the same day, the Commission issued a second complaint against petitioner which contained the identical allegations of fact and charges contained in the previous complaint and covered the exact same period of time (R. 57; 64). (A second count under the Robinson-Patman Act was added, which is not material to this case since, after hearing and argument, it was dismissed by the Commission.) Petitioner filed its Motion to Dismiss and, in the alternative, its Answer (R. 63-5). This motion was never passed upon by the Commission. Over petitioner's objection (R. 765-6) hearings were held and testimony taken. Under date of December 9, 1944, the Commission issued its order to "cease and desist" (R. 81).

Your petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals.

II. Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Title 28 U.S.C.A. Sec. 347 (a).

The statute of the United States involved in this proceeding is known as the Federal Trade Commission Act (Act of September 26, 1914, 38 Stat. 717, 719-721, as amended by Act of March 21, 1938, 52 Stat. 111-114, and by §1107 (f) of Act of June 23, 1938, 52 Stat. 1028; 15 U.S.C.A. §45). The Act of February 13, 1925, cited above, provided that cases arising under this section shall be included among the cases to which Sections 346 and 347 of Title 28 Judicial Code, relating to certiorari by the United States Supreme Court, shall apply.

The judgment of the Circuit Court of Appeals for the Sixth Circuit now sought to be reviewed was entered by the said Court on February 4, 1946 (R. 785) and is final and erroneous. No petition for rehearing was filed.

III. Questions Presented.

(a) In the absence of any showing of fraud or deception on the public, or of disparagement or demoralization of the competitive market, petitioner's practice of granting "obsolescence" protection, guarantee of profits, and loans to jobbers, did not constitute unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act.

(b) Petitioner's practices, when introducing a new and improved product, of protecting jobbers against

threats of reprisal by large competitor manufacturers if the jobbers handled or refused to give up petitioner's product, said practices consisting of buying competitive rings owned by the jobber, guaranteeing profits, and making loans to the jobbers, did not constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act.

(c) After the issuance of a complaint, filing of an answer, and hearings thereon, the Federal Trade Commission is without authority or jurisdiction under the Federal Trade Commission Act to dismiss the same "without prejudice" and immediately issue a new complaint against the same respondent which contains identical charges and allegations of fact and covers exactly the same period of time.

IV. Reasons Relied on for the Allowance of the Writ.

(a) This case presented for the first time the question as to whether the practice of purchasing at the jobber's cost competitor's products by a manufacturer, in the absence of fraud, deception and discrimination and where such products are not resold at cut prices or at any price, constitutes an unfair method of competition in commerce and an unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act. It also presented for the first time the question whether the guarantee of profits, where no payment was ever required or made thereunder by petitioner, and loans by petitioner to its jobbers, constitute unfair methods of competition and unfair or deceptive acts or practices within the provisions of the Act. It is submitted that this is an important question of federal law which has not been, but should be, settled by this Court.

(b) The decision of the Circuit Court of Appeals in this case decided a federal question in a way probably in conflict with applicable decisions of that court on the same matter. The Sixth Circuit, in this case, completely disregarded the competitive conditions in the industry which gave rise to the practices complained of. Yet that Court, in *Ford Motor Co. v. Federal Trade Commission* (1941), 120 F. (2d) 175, 181 said, ". . . What constitutes 'unfair methods of competition' must be decided in particular instances upon incidences in light of existing competitive conditions."

(c) The Circuit Court of Appeals for the Sixth Circuit has decided in this case an important question of federal law which has not been, but should be, settled by this Court. The case involves the question whether the Federal Trade Commission has authority under the Federal Trade Commission Act and its own Rules to dismiss a complaint "without prejudice" after hearings thereon and immediately issue against the respondent a new complaint containing identical charges and allegations of fact and covering the same period of time.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9963, Hastings Manufacturing Company, Petitioner, v. Federal Trade Commission, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States;

and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

HASTINGS MANUFACTURING COMPANY,

By Laurence A. Masselink,
Counsel for Petitioner.

Joseph A. Vance, Jr.,
Alfred E. Lindbloom,
Beaumont, Smith & Harris,
Of Counsel.

Detroit, Michigan,

Dated April 15, 1946.

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. .....

Hastings Manufacturing Company,
a Michigan corporation,
Petitioner,

v.

Federal Trade Commission,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The opinion in the Circuit Court of Appeals for the Sixth Circuit is, as yet, unreported. It was rendered February 4, 1946, and will be found on pages 785 to 796 of the Record.

Jurisdiction

1. The date of the judgment to be reviewed is February 4, 1946.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C.A. Sec. 347 (a); and the Act of September 26, 1914, 38 Stat. 717, 719-721, as amended by Act of March 21, 1938, 52 Stat. 111-114, and by Sec. 1107 (f) of Act of June 23, 1938, 52 Stat. 1028, 15 U.S.C.A. Sec. 45, known as the Federal Trade Commission Act.

3. The nature of the case, the judgment of the Circuit Court of Appeals for the Sixth Circuit, and the reasons why a writ of certiorari should be granted are summarized or set forth in the foregoing petition. The Circuit Court of Appeals has in this case "decided an important question of federal law which has not been, but should be, settled by this Court" (Supreme Court Rule 38 (5) (b)).

Statement of the Case

This has already been stated in the preceding petition under I (pp. 1-5), which is hereby adopted and made a part of this brief.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the practices of granting "obsolescence" protection, guarantee of profits, and loans to jobbers, as employed by petitioner, constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act.

2. The Circuit Court of Appeals erred in not holding that in the light of existing competitive conditions the practices of granting "obsolescence" protection, guarantee of profits and loans to jobbers, did not constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the provisions of the Federal Trade Commission Act.

3. The Circuit Court of Appeals erred in holding that the Federal Trade Commission had authority to issue a second complaint containing identical charges and covering the exact same period of time as a former complaint against the same respondent which, after hearing, it had dismissed "without prejudice."

ARGUMENT

A. Petitioner's Policy of Granting "Obsolescence" Protection, the Guarantee of Profits, and Loans to Its Jobbers, Did Not Constitute an Unfair Method of Competition in Commerce and an Unfair or Deceptive Act or Practice Within the Meaning of the Federal Trade Commission Act.

With but few exceptions the courts have not expanded the doctrine of unfair trade to include any practice in which there is not fraud or deceit, palming off or passing off. None of these elements is present here. *Kinney-Rome Co. v. Comm'n.*, (CCA 7, 1921), 275 F. 665; *Queen Manufacturing Co. v. Isaac Ginsberg & Bros.* (CCA 8, 1929), 25 F. (2d) 284; *Ford Motor Co. v. Comm'n.* (CCA 6, 1941), 120 F. (2d) 175. As was said in *Northam Warren Corporation v. Comm'n.* (CCA 2, 1932), 59 F. (2d) 196, 198,

> "In order that the Commission proceed in the public interest the courts have insisted not only upon a showing that the practice is unfair and disapproved, but also that the public are misled thereby."

In the cases which the Commission has considered involving "lifting" of competitors' products, this requirement has been observed. *Waldes & Co., Inc.,* 8 F.T.C. 305; *R. M. Hollingshead Corp.,* Docket No. 3661 (CCH Trade Reg. Service, par. 6430.40); *F.T.C. v. Charles Tager,* Docket No. 1025 (CCH, par. 6430.40); *National Cash Register Co.,* Docket No. 1328 (CCH, par. 6430); *Reifschneider Paint & Glass Co.,* Docket No. 1716 (CCH, par. 6430.40). In no case decided by the Commission or any court has the practice been held unfair in the absence of palming off, or disparagement or demoralization of the competitive market by reselling at cut prices.

What constitutes unfair competition is a question of law which must ultimately be determined by the courts. *Federal Trade Commission v. Gratz,* 253 U.S. 421, 427; *Federal Trade Commission v. Curtis,* 260 U.S. 568, 579-580.

B. In the Light of Existing Competitive Conditions Petitioner's Practices of Obsolescence Protection, Guarantee of Profits, and Loans to Jobbers Did Not Constitute Unfair Methods of Competition in Commerce and Unfair or Deceptive Acts or Practices Within the Provisions of the Federal Trade Commission Act.

It has always been the general practice in the piston ring industry for a manufacturer to take back for credit or exchange for new rings any of its rings (including "overage") in the hands of a jobber actively representing it, regardless of whether the rings were of a current

or outmoded type. However, when a jobber discontinued a line of rings or a manufacturer cancelled a jobber's contract and "pulled" its line, only the consigned stock of its rings would be taken back by the manufacturer, thus leaving the jobber to "swallow" any rings of its make owned outright by him (R. 279-280; 325; 351; 391-2; 473; 493; 505; 519). Hastings, on the other hand, whenever it discontinued doing business with a jobber, regardless of whether Hastings or the jobber took the initiative in terminating the relationship, always took back all of its rings in the hands of the jobber, whether part of his consigned stock or owned outright by the jobber, and paid him his cost in cash for those rings (C.E. 169; R. 280, 582).

Competitive manufacturers repeatedly threatened to pull and did pull their line or cancel their contracts if a jobber took on or refused to give up the Hastings' line (R. 213; 217; 310-11; 331; 461; 524; 578). In order to meet this situation, petitioner, about 1936, established a general policy of protecting all its jobbers against loss by reason of that jobber discontinuing a competitive line of rings or by reason of a competitor manufacturer pulling its line when the jobber took on or refused to give up the Hastings line. In a few instances, petitioner guaranteed a jobber that his gross profit from Hastings rings would exceed by a specified per cent that of a preceding year with a competitive line. In every instance where such an offer was made it was to meet the threat of a competitive manufacturer to pull its line (R. 754-5).

Neither the Commission nor the Circuit Court of Appeals took into consideration the existence of this competitive situation. It was not included in the Commission's findings. It was not mentioned in the Court's opinion. This was clearly error. *Ford Motor Co. v. Comm'n.* (CCA 6, 1941), 120 F. (2d) 175, 181. The

Supreme Court, in *Federal Trade Comm'n. v. Curtis,* 260 U.S. 568, 580, said that "the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission."

It is submitted that the practical result of the rule laid down by the Circuit Court of Appeals is to restrict competition and foster monopoly. Until petitioner offered "obsolescence" protection, a jobber was compelled to decline to take on Hastings rings even as a side-line in order to preserve his own investment in the line of rings he was then handling. Manufacturers by threatening to pull their line and leave the jobber to swallow his "overage" relied on this situation to prevent the introduction on the market of Hastings' new "Steel-Vent" ring. The practice employed by petitioner encouraged competition. It permitted the jobber to make a decision as to what line or lines he would carry without fear of loss by reason of the practices of competitor manufacturers. In no case did the jobber receive from Hastings more than his inventoried cost of the competitive rings taken up, which was exactly what he would have received had he remained or been allowed to remain a representative of the competitor manufacturer. Without this practice of petitioner's, the availability to the public of this superior type of ring, now copied by all the leading manufacturers, might have been indefinitely postponed or even prevented entirely. Where the distribution of a device, such as Hastings' new ring, must be made through a jobber organization, public interest demands that that field be open and not closed. Petitioner submits that its practices have in them no unfairness in the sense that they tend to destroy competition or create a monopoly. Their tendency and their result are directly the opposite. They foster and are a necessary part of fair competition in the piston ring industry.

C. The Federal Trade Commission Has No Authority to Issue a Second Complaint Containing Identical Charges and Covering the Exact Same Period of Time as a Former Complaint Which, After Hearing, it had Dismissed "Without Prejudice."

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes . . ."—*Arrow-Hart & H. Co. v. Commission*, 291 U.S. 587, 598.

In *Federal Trade Commission v. Western Meat Co.*, 272 U.S. 554, at 559, this Court said,

> "Without doubt the Commission may not go beyond the words of the statute properly construed, but they must be read in the light of its general purpose and applied with a view to effectuate such purpose."
>
> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial functions."—*Federal Trade Commission v. Eastman Co.*, 274 U.S. 619, 623.

There is no authority for what the Commission did here either in the Federal Trade Commission Act or in the Commission's own rules.

Sec. 5 (b) of the Federal Trade Commission Act provides:

> ". . . After expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of

> the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section."

Section 2.26 of the Commission's Rules of Practice provides:

> "In any case where an order to cease and desist has been issued by the Commission, the Commission may . . . (b) in the case of an order dismissing at any time thereafter, give reasonable notice to all respondents and to all intervenors, if any, of a hearing as to whether the said proceeding shall be reopened. If after said hearing the Commission shall have reason to believe that conditions of fact or law have so changed since the said order was made as to require, or that the public interest requires, the reopening of such proceeding, the Commission will issue an order for the reopening of the same."

Had the Commission followed the only procedure authorized by the statute and its own rules, your petitioner would then have had an adequate remedy by appearing and showing cause why the threatened reopening order should not be entered, and, if the reopening were ordered, by bringing action in the Circuit Court of Appeals to have the order set aside. See also, *Royal Baking Powder Co. v. Federal Trade Commission*, 32 F. (2d) 966, cert. denied, 50 S. Ct. 28. In the instant case no semblance of the required procedure was followed. What was done

permitted the Commission arbitrarily to accomplish the identical result and at the same time deprive your petitioner not only of notice and opportunity to be heard, but also of its statutory right to review any adverse order of the Commission in the Circuit Court of Appeals. Petitioner submits that the limitations placed upon the arbitrary exercise of authority and jurisdiction by the Commission cannot thus be circumvented, especially where to do so destroys the safe-guards to petitioner's rights provided by law.

> "An order of dismissal finally disposes of the proceeding subject to power of the Commission to reopen the proceedings if change in law or fact or public interest warrant it."—Beer, *Federal Trade Law and Practice*, Sec. 123D, page 413.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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April 15, 1946

MAY 14 1945
CHARLES ELMORE CROPLEY
CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1945

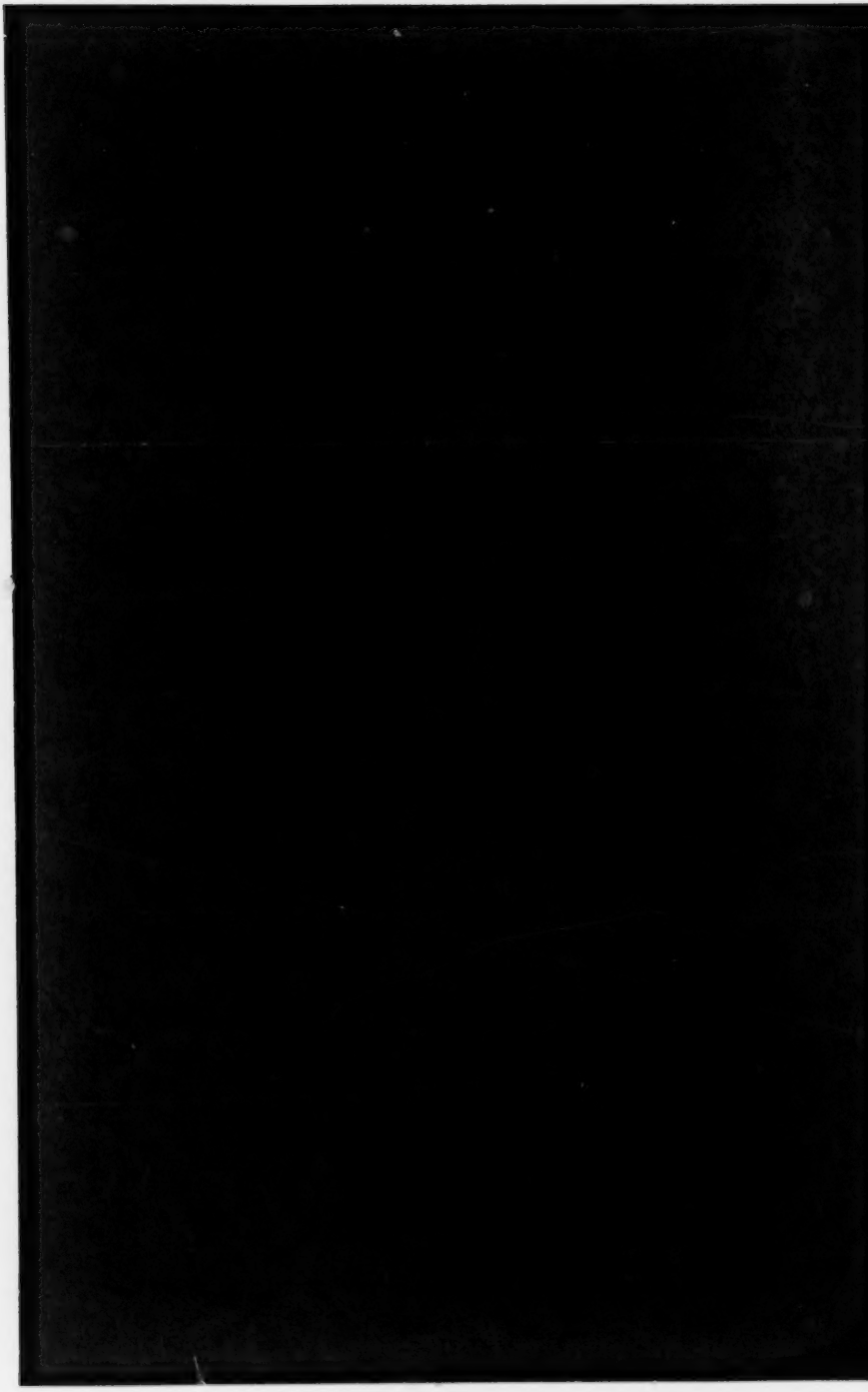
HASTINGS MANUFACTURING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION



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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 786) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 4, 1946 (R. 785). The petition for a writ of certiorari was filed on April 17, 1946. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether petitioner's practice, pursued deliberately and successfully, of obtaining agreements by jobbers to handle petitioner's product exclusively, by offering to purchase all goods of competitors owned by the agreeing jobber, to make loans to the jobber or to guarantee him higher profits, constitutes an unfair method of competition within the meaning of the Federal Trade Commission Act.

(2) Whether the Federal Trade Commission is authorized to issue a complaint under Section 5 of the Federal Trade Commission Act after having dismissed without prejudice a prior complaint making the same charges against the same respondent.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

This is a proceeding to review the validity of an order of the Federal Trade Commission issued under Section 5 of the Federal Trade Commission Act.[1] The Commission, prior to issuing the complaint upon which this order is based, had dismissed without prejudice an earlier complaint making the same allegations as to petitioner's violation of Section 5 (R. 7–10, 16, 57–60).

The court below, after making "a careful review and analysis of the record" in the light of petitioner's challenge of many of the Commission's findings, concluded that the findings were adequately supported by evidence (R. 790–791), and in this Court petitioner has not challenged the findings of the Commission.[2] We therefore summarize the facts in the case as found by the Commission.

Since 1923 petitioner has been manufacturing piston rings and other allied products for use as replacement parts for automobiles (R. 69–70). Both petitioner and its competitors market their

[1] The complaint issued by the Commission also charged petitioner with discriminating in price between different purchasers of its products in violation of Section 2 (a) of the Clayton Act, but the Commission, upon final hearing, dismissed this part of its complaint (R. 60–61, 83).

[2] While petitioner asserts that the Commission's findings ignore certain pertinent facts on which evidence was offered, failure to find such facts is not specified as error or included in the questions presented by the petition (Pet. 5–6, 10–11, 13–14).

rings through jobbers (R. 71). Individual jobbers handle the rings of from one to four manufacturers and the handling of two or three competing lines is not uncommon (*ibid.*). Early in 1936, after petitioner had introduced a new type of ring for which it claimed superior qualities, it began an aggressive campaign to obtain new, and so far as possible exclusive, channels of distribution, by inducing jobbers to sell petitioner's rings exclusively and to discontinue sale of whatever competing rings the jobber was then handling (R. 70, 71). As to jobbers who could not be persuaded to "go 100% Hastings", petitioner sought to obtain an understanding that the jobber would concentrate his sales effort on petitioner's rings (R. 72). Petitioner, which at the end of 1935 had about 600 jobbers and ranked sixth or seventh in volume of sales of piston rings for replacement purposes, secured in the next five years some 900 new jobbers and became the second largest seller of rings to the replacement trade (R. 70, 80).

Petitioner and its competitors customarily place rings with jobbers on consignment (R. 71). Apart from consigned stock, which is in the nature of a basic inventory, the jobber must purchase other types of rings if he wishes to handle them and it is not uncommon for a jobber to have on hand substantial quantities of rings which he has purchased outright, such rings being commonly referred to as overage (*ibid.*). Petitioner, as a

means of obtaining exclusive jobber outlets, made it a practice to offer to purchase a jobber's entire overage, regardless of the age, condition, or actual value of the rings, at the cost of the rings to the jobber (R. 72–73). Rings so purchased were shipped to petitioner's factory and there destroyed or they were destroyed locally by petitioner's representatives (R. 73). Petitioner made purchases of this kind from about 173 jobbers, at a total cost of about $281,000 for the years 1937 to 1940, inclusive (R. 76).

Petitioner also made loans to jobbers for the purpose of inducing the borrowing jobber to handle petitioner's product exclusively. In the years 1937 to 1940, inclusive, petitioner made loans to some 29 jobbers aggregating about $151,000 (R. 72, 78). In addition, petitioner sometimes guaranteed that the jobber's profit from the sale of petitioner's rings would exceed his past year's profit from the sale of other rings (R. 72). These methods—purchase of overage, loans, and profit guarantees—were used singly or in conjunction as the circumstances of the particular case seemed to require (*ibid.*). The effect of petitioner's practices has been unfairly to divert trade to petitioner, unreasonably to lessen and restrain competition in the sale of piston rings for the replacement trade, and to tend to give petitioner a monopoly of this trade (R. 81).

The Commission concluded that the foregoing practices constituted unfair methods of competition and unfair and deceptive acts and practices (R. 81). The Commission accordingly issued an order requiring petitioner to cease and desist from purchasing from any distributor his stocks of products competitive with those of petitioner, from making any loan to any distributor, and from giving distributors guarantees of increased profits when such purchase, loan or guarantee was made to induce the distributor to discontinue handling all products competitive with those of petitioner and to handle petitioner's products in lieu thereof (R. 82–83).

On review of this order, the court below held that the statute warranted the Commission's determination as to the unfairness of petitioner's methods of competition (R. 791–796). The court also held that the dismissal without prejudice of an earlier complaint against petitioner did not estop the Commission from issuing a second complaint making the same charges of violation of Section 5 of the Act (R. 786–788).

ARGUMENT

I

In *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 463–464, this Court held that if a practice runs counter to the policy of the Clayton Act the Federal Trade

Commission has the power to suppress it as an unfair method of competition. Section 2 (a) of the Clayton Act makes it unlawful directly or indirectly to discriminate in price between different purchasers. If petitioner's jobbers had been purchasers instead of consignees, the special advantages which petitioner gave to particular jobbers by purchasing overage, making loans or giving profit guarantees would constitute indirect discriminations in price prohibited by Section 2 (a). See *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 740. We submit that petitioner's practices were so closely akin to those prohibited by Section 2 (a) that they must be deemed to run counter to the policy of that Act and to be, therefore, "unfair" methods of competition within the meaning of the Federal Trade Commission Act.

But aside from the foregoing consideration, the statute clearly authorizes the determination made by the Commission in this case. Petitioner's practices had the purpose and effect of securing for it a monopoly of as many as possible of the distribution outlets which are the medium through which petitioner and its competitors market their goods, and the Commission found that the practices tended to suppress competition and to create in petitioner a monopoly of the trade in which it was engaged. In *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457, 464–

466, this Court held that practices which tend to monopolize trade and to narrow the outlets to which competitors can sell are within the prohibitions of the Federal Trade Commission Act. That Act was designed to have a "prophylactic effect" and to stop in their incipiency practices having a monopolistic purpose and effect (*idem.*, p. 466). In addition, the practices which the Commission found to be unfair involved giving special and variable inducements to jobbers for the purpose of depriving competitors of many of their existing channels of distribution. A method of competition which casts upon competitors the burden of loss of business "unless they will descend to a practice which they are under a powerful moral compulsion not to adopt", represents "the kind of unfairness at which the statute was aimed". *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 313.

It should also be noted that while final decision as to whether a method of competition is "unfair" rests with the courts, "in passing on that question the determination of the Commission is of weight" and the courts should not, where the matter is doubtful, reject the Commission's conclusion. *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 314. Congress created the Commission "with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by

reason of information, experience and careful study of the business and economic conditions of the industry affected.' " *Ibid.*

Petitioner contends (Pet. 13) that the Commission and the court below erroneously failed to adjudge petitioner's practices in the light of its competitive situation. The Commission did not reject evidence offered by petitioner in justification of its practices, as had been done in the *Fashion Originators' Guild* case, and the basis of petitioner's contention must be that the Commission failed to find certain facts, material to the issues, upon which conclusive evidence had been presented. Presumably the Commission did not find such facts for the reason that it was not satisfied as to the sufficiency of the evidence thereon,[3] and petitioner, in challenging the Commission's action, presents no question of law meriting review by certiorari. Furthermore, petitioner did not attack the Commission's order upon this ground in the petition for review which it filed in the court below (R. 1–6). The two cases cited by petitioner on the present point are not in any respect in conflict with the decision below.[4]

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[3] One of the headings in the Commission's brief in the court below is: "Petitioner's contention that its offer of 'obsolescence protection' was forced upon it by competitors is not supported by substantial competent evidence".

[4] *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175 (C. C. A. 6), certiorari denied, 314 U. S. 668, sustained the validity of an order of the Commission directed against

II

The Commission's dismissal without prejudice of an earlier complaint against petitioner, prior to any determination of the issues presented, could have no greater effect in barring the filing of a subsequent complaint than where the plaintiff in a civil proceeding brought in the courts obtains dismissal without prejudice of his action. Since the right of a plaintiff in court thus to dismiss his action is established, there can be no doubt that the Federal Trade Commission has a like right to dismiss its complaint without prejudice and to issue a second complaint. "The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 19, which held this rule applicable to administrative bodies. See also *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.,* 297 U. S. 230, 232; *Warner Bros. Pictures, Inc.* v. *United States,* 298 U. S. 643.

The provisions of the statute and of the Commission's Rules of Practice cited by petitioner

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unfair methods of competition. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, set aside an order of this kind upon the ground that the facts as found by the Commission did not warrant its order.

(Pet. 15–16) are irrelevant. The former relates to proceedings following issuance of an order of the Commission and the latter deals with the reopening of a complaint which the Commission has dismissed, not with the issuance by it of a new complaint.[5]

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Federal Trade Commission.

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[5] The second complaint was broader than the first since the second complaint, but not the first, charged petitioner with violating Section 2 (a) of the Clayton Act (R. 7–12, 60–61).

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